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DISCUSSION OF RECENT DECISIONS

ADJOINING LAND OWNERS—LOSS OF LATERAL SUPPORT—
PROOF OF COST OF REPAIR AS MEASURE OF DAMAGES.—In *Levine*
v. City of New York,¹ an action for damages for the loss of lateral
support to the plaintiff's land, the plaintiff was allowed to show
the cost of repairing his land to its former condition as the meas-
ure of damages. The court said that by offering to show the cost
of repair, the plaintiff implied that the cost of repair was less
than the lessened market value of the land as a result of the loss
of lateral support.

While many of the earlier decisions of this country held the
measure of damages which could be shown was the lessened mar-
ket value of the land only and not the cost of repairing the land,²
the later decisions of most of the states have adopted the rule
as stated in the *Levine* case.³ In *Donk Bros. Coal & Coke Co. v.*

¹ 290 N. Y. S. 953 (1936).

² *Schroeder v. City of Joliet*, 189 Ill. 48, 59 N. E. 550 (1901); *Moellering*
v. Evans, 121 Ind. 195, 22 N. E. 989 (1889); *Orr v. Dayton & M. Tract*
Co., 178 Ind. 40, 96 N. E. 462 (1911); *Schmoe v. Cotton*, 167 Ind. 364, 79
N. E. 184 (1906); *Schultz v. Bower*, 64 Minn. 123, 66 N. W. 139 (1896);
Thomas v. Klauber, 43 S. W. (2d) 885 (Mo. App., 1931); *Pullan v. Stall-*
man, 70 N. J. L. 10, 56 A. 116 (1903).

³ *Stimmel v. Brown*, 7 Houst. (12 Del.) 219, 30 A. 996 (1885); *Smith v.*
Howard, 201 Ky. 249, 256 S. W. 402 (1923); *Donk Bros. Coal & Coke Co.*
v. Slata, 133 Ill. App. 280 (1907); *Fitz Simons & Connell Co. v. Braun &*
Fitts, 94 Ill. App. 533 (1901), *aff'd* 199 Ill. 390, 65 N. E. 249 (1902).

Slata,⁴ the Appellate Court of Illinois refused to follow the earlier decisions but said the real measure of damages in all cases of loss of lateral support is either the cost of repairing the injury or the lessened market value, whichever is the lesser. Certainly this is the more reasonable rule for it does not compel the defendant to pay large damages in cases where the entire damage could be repaired at a small cost, nor does it leave the plaintiff without recovery in cases where the proof of the lessened market value would be difficult or impossible.

The first cases to follow the latter view were those in which the entire damage was to buildings. In such cases the cost of repair in all cases would be complete indemnity. However, this rule has been extended to all cases of loss of lateral support whether the damage was to land or buildings or both. It cannot be doubted that proof of the cost of repair in all cases would be simpler and less expensive than proof of the lessened market value through conflicting testimony of appraisers. Still, the defendant, if able to show that the market value was not less, would retain the benefit of the fundamental principle of damages in these cases—that there could be no recovery unless the market value was lessened.

V. A. FORSBERG

BREACH OF PROMISE TO MARRY—STATUTORY ABOLITION—POWER OF LEGISLATURE TO ABOLISH COMMON LAW RIGHT OF ACTION—The constitutionality of the New York statute abolishing the right to sue for breach of promise to marry, seduction, or alienation of affections¹ was upheld by the New York Court of Appeals in the recent case of *Fearon v. Treanor*.² The plaintiff in the case, suing for breach of promise to marry and for seduction, contended that the legislature had no power to abolish a common law cause of action without supplying a reasonable substitute therefor. The defendant relied on the statutory bar to the action.

With regard to the allegation of seduction the court upheld the constitutionality of the statute on the proposition that at common law a woman had no cause of action for seduction³ and hence the legislature, having created the cause of action, had the power to destroy it.

In sustaining the statute with regard to breach of promise to marry, the court stated that all matters relating to marriage had

⁴ 133 Ill. App. 280 (1907).

¹ New York Statutes, Ch. 263 of the Laws of 1935 (Civ. Prac. Act, Art. 2-A, sec. 61-a et seq.).

² 288 N. Y. S. 368 (1936).

³ *Hamilton v. Lomax*, 26 Barb. 615 (1858); *In re Casper's Will*, 291 N. Y. S. 585 (1936).

always been under legislative control; that the legislature had power to deal with matters pertaining to public policy; that the statute in question, by its expressed intention, had been enacted to eliminate the abuses connected with such causes of action; and that the legislature may abolish a common law cause of action where some recognized public interest is served.⁴

The present case is the first of several recent New York Supreme Court cases bearing upon this statute to reach the Court of Appeals. In the case of *Vanderbilt v. Hegeman*⁵ the constitutionality of the statute was upheld, although the decision rested upon somewhat different grounds.⁶

In the case of *Hanfarn v. Mark*,⁷ an action for alienation of affections, the Appellate Division of the Supreme Court upheld the lower court and allowed recovery, holding the statute unconstitutional. The court based its decision on the proposition that common law rights of action are beyond the power of the legislature to abolish utterly without supplying some reasonably adequate and sufficient substitute.⁸ In a dissenting opinion Justices Davis and Adel contended that the statute constituted a valid exercise of the police power, and that the legislature had the right to determine and enforce public policy.

The decisions in the cases of *Fearon v. Treanor* and *Hanfarn v. Mark* rest upon the power of the legislature to abolish utterly a common law right of action. The divergence of opinion on this point is indicated by the diametrically opposed conclusions reached. In this connection the decision of the Court of Appeals in *Fearon v. Treanor* tends to follow the view of the United States Supreme Court which has upheld the proposition that there is no vested right in a common law cause of action.⁹

So-called "heart balm" legislation similar to the New York statute has recently been enacted in several states, including

⁴ *People v. Noelke*, 94 N. Y. 137 (1883); *People v. Title and Mortgage Guarantee Co.*, 264 N. Y. 69, 190 N. E. 153 (1934).

⁵ 284 N. Y. S. 586 (1935).

⁶ The plaintiff contended that the legislature had no power to establish a sixty-day limitation period upon the right to bring suit upon a cause of action existing at the time the statute went into effect. The court upheld the statute and denied recovery, holding that the plaintiff had no vested right in a fixed limitation of time for commencing an action and that new statutes of limitation are not unconstitutional if giving reasonable time for commencing an action before the bar takes effect.

⁷ 289 N. Y. S. 143 (1936).

⁸ *MacMullen v. City of Middletown*, 98 N. Y. S. 145 (1906); *Williams v. Village of Port Chester*, 76 N. Y. S. 631 (1902); *Herkey v. Agar Mfg. Co., Inc.*, 153 N. Y. S. 369 (1915).

⁹ *Munn v. Illinois*, 94 U. S. 278, 24 L. Ed. 77 (1877); *Silver v. Silver*, 280 U. S. 117, 74 L. Ed. 221 (1929); *Home Building and Loan Association v. Blaisdell*, 290 U. S. 398, 78 L. Ed. 413 (1934).

Illinois,¹⁰ but no cases have been decided by the high courts in these states as yet. The Illinois and New York legislatures attempted to bring the statutes within the police power of the legislature by making it unlawful to bring, or threaten to bring, an action of the type named.

Doubts of the constitutionality of the Illinois act have been expressed by the Attorney General and by Governor Horner on the ground that it is violative of Article 2, Section 19, of the Illinois Constitution.¹¹ Because of the close similarity of the Illinois and New York statutes, however, the decision in *Fearon v. Treanor* may be indicative of the attitude which the courts of Illinois will take in considering the constitutionality of this measure.

J. M. LOCKHART

COURTS—CONSTITUTIONAL AND STATUTORY PROVISIONS—EFFECT OF CIVIL PRACTICE ACT ON RIGHT TO DISCONTINUE ACTION IN MUNICIPAL COURT.—In *Ptacek v. Coleman*¹ the Illinois Supreme Court has decided that the Civil Practice Act is not controlling on practice in the Municipal Court of Chicago. The particular point in question was whether or not, after hearing, an action could be discontinued by motion in open court as permitted by Municipal Court rules,² or whether, as provided by the Civil Practice Act,³ dismissal could be had only on stipulation or upon order of court on special motion in which the ground of dismissal was set forth and supported by affidavit.

The decision is based on the fact that the constitutional amendment permitting the creation of the municipal government of the City of Chicago, including the Municipal Court, requires that no law based upon that amendment nor any local or special law based thereon affecting specially any part of the city shall take effect until ratified by referendum.⁴ Since the Civil Practice Act was not ratified by referendum it can not affect the Municipal Court in the face of the constitutional prohibition set forth.

L. WHIDDEN

EVIDENCE — JUDICIAL NOTICE — MUNICIPAL ORDINANCES AND THEIR VALIDITY AS SUBJECT OF JUDICIAL NOTICE.—In *Woods v.*

¹⁰ Smith-Hurd's Ill. Rev. Stat. (1935), Ch. 38, § 246.1.

¹¹ "Every person ought to find a certain remedy in the laws for all injuries and wrongs which he may receive in his person, property, or reputation."

¹ 364 Ill. 618, 5 N. E. (2d) 467 (1936).

² Municipal Court Act of 1905 as amended, Smith-Hurd's Ill. Rev. Stat. (1935), Ch. 37, § 356.

³ Civil Practice Act, Sec. 52; Smith-Hurd's Ill. Rev. Stat. (1935), Ch. 110, § 176.

⁴ Ill. Const. Art. IV, Sec. 34 (Amendment of 1904).

*Village of La Grange Park*¹ the Illinois Appellate Court for the First District partially quotes and then applies the statement of the Illinois Supreme Court in *People v. Keokuk and Hamilton Bridge Company*² that "the doctrine of judicial notice is a branch of the law of evidence, and authorizes the court whenever a fact is material, which is comprehended by such doctrine, to take judicial notice of the fact, but it must be presented to the court in some way."³ It should be noted that this statement, being perhaps unnecessary to a decision of the issue before the Supreme Court, might be considered dictum.

In the Woods case, the plaintiff, an attorney, sued in assumpsit for legal services rendered. The defendant pleaded the general issue and filed an affidavit of merits in which it alleged that the plaintiff had acted as village attorney under an ordinance creating the office which limited its incumbent's remuneration to \$100 per year, which sum had been paid. The pertinent sections of the ordinance were set forth. The plaintiff filed a replication denying that during the period the services were rendered there was any such valid ordinance. No objection was made to this manner of raising the question of validity. On motion by the defendant, the trial court instructed the jury to find for the defendant and verdict and judgment were so rendered.

The appellate court, in reversing the trial court, after quoting the Supreme Court as above, said, ". . . the ordinance was not presented at all on the trial of this cause and therefore cannot be judicially noticed by this court," and, "The provisions of the statute that both the trial court and courts of review will take judicial notice of general ordinances of municipalities within the jurisdiction of the trial court⁴ are only applicable to the contents of such ordinances as facts when there is no question raised as to the legal existence or validity of the ordinances themselves."

Although judicial notice is official knowledge by the court of certain facts and circumstances,⁵ it necessarily can be used only where a controversy, to which such facts are relevant, is before the court.⁶ But it has long been recognized by leading text

¹ 287 Ill. App. 201, 4 N. E. (2d) 764 (1936).

² 287 Ill. 246, 122 N. E. 467 (1919).

³ Sentence continues, "and not by demurrer or motion to strike."

⁴ Smith-Hurd's Ill. Rev. Stat. (1935), Ch. 51, §§ 48a and b, subsecs. 1 and 2.

⁵ 23 C. J. 58, § 1807; 1 Chitty on Pleading (8th Am. ed.) 215; 5 Wigmore on Evidence (2d ed.) 570, § 2567; *Wolfe v. Mallinckrodt Chemical Works*, 336 Mo. 746, 81 S. W. (2d) 323 (1935).

⁶ 15 R. C. L. 1062; 23 C. J. 58; *State of Arkansas v. Kansas & Texas Coal Co.*, 183 U. S. 185, 46 L. Ed. 144 (1901); *Mutual Life Ins. Co. v. McGrew*, 188 U. S. 291, 47 L. Ed. 480 (1903); *Wilkes County Comrs. v. Coler*, 180 U. S. 506, 45 L. Ed. 642 (1900).

writers in their works,⁷ and in numerous decisions by courts of high authority,⁸ that matters of which the court should take judicial notice need not be brought to the court's attention either by pleading or evidence. As Coke put it, "That which appears to the court needs not the aid of witnesses,"⁹ and, "The law does not require that to be verified which is apparent to the court."¹⁰

While judicial notice of public statutes of the government of which the court was a part was mandatory at common law,¹¹ ordinances of municipal corporations were generally not accorded such notice,¹² and before the passage of the judicial notice statute,¹³ Illinois so held.¹⁴

Statutes regarding judicial notice have been construed in some states to be mandatory,¹⁵ in others permissive.¹⁶ The Illinois statute has in a number of appellate court cases been held to be mandatory and to require both trial and appellate courts to notice judicially ordinances of municipalities and rules of inferior courts.¹⁷ One case held that "the statute, being remedial, requires that the appellate court take judicial notice of the rules of the municipal court though the question be involved in a case where judgment was entered before the act went into effect, especially where writ of error was sued out in the appellate court

⁷ 5 Wigmore on Evidence (2d ed.) 571, § 2568; 1 Chitty on Pleading (8th Am. ed.) 215; 23 C. J. 58.

⁸ *Brown v. Piper*, 91 U. S. 37, 23 L. Ed. 200 (1875); *People of State of Ill. v. Pease*, 207 U. S. 100, 52 L. Ed. 121 (1907); *Lindsley v. Natural Carbonic Gas Co.*, 220 U. S. 61, at 79, 55 L. Ed. 369 (1910); *U. S. v. Rio Grande Dam & Irr. Co.*, 174 U. S. 690, 43 L. Ed. 1136 (1898); *Office Specialty Mfg. Co. v. Fenton Metallic Mfg. Co.*, 174 U. S. 492, 43 L. Ed. 1058 (1899); *Perovich v. Perry*, 167 F. 789 (1909); *Chas. Boldt Co. v. Turner Bros. Co.*, 199 F. 139 (1912); *French v. Senate of State of Cal.*, 146 Cal. 604, 80 P. 1031 (1905); *Journal Printing Co. v. City of Racine*, 210 Wis. 222, 246 N. W. 425 (1933); *Knisely v. Community Traction Co.*, 125 Ohio St. 131, 180 N. E. 654 (1932); *Wolf v. Mallinckrodt Chemical Works*, 336 Mo. 746, 81 S. W. (2d) 323 (1934); *State ex. rel. Landis v. Thompson*, 121 Fla. 561, 164 So. 192 (1935).

⁹ 2 Inst. (Coke) 662; Best on Evidence, § 252.

¹⁰ *Baten's Case*, 9 Coke 54b, 77 Eng. Rep. 811 (1611).

¹¹ 1 Chitty on Pleading (8th Am. ed.) 215.

¹² *People v. Coffin*, 279 Ill. 401, 117 N. E. 85 (1917); *State v. City of McAllen*, 91 S. W. (2d) 688 (Tex. Civ. App., 1936); *Green v. Indianapolis*, 22 Ind. 192 (1864); *People v. Mayor*, 79 How. Pr. 81 (1851); *Harker v. Mayor*, 17 Wend. 199 (1837); 5 Wigmore on Evidence (2d ed.) 580, § 2572.

¹³ *Smith-Hurd's Ill. Rev. Stat.* (1935), Ch. 51, §§ 48a and b, subsecs. 1 and 2.

¹⁴ *People v. Coffin*, 279 Ill. 401, 117 N. E. 85 (1917).

¹⁵ *Ex parte Berry*, 147 Cal. 523, 82 P. 44 (1905).

¹⁶ *Hunt v. Monroe*, 32 Utah 428, 91 P. 269 (1907); 23 C. J. 59, § 1809.

¹⁷ *Whalen v. Twin City Barge & Gravel Co.*, 280 Ill. App. 596 (1935); *Paulick v. Nat. Bk. of Republic*, 279 Ill. App. 160 (1935); *People ex rel. Krajci v. Kelly*, 279 Ill. App. 22 (1935); *Chicago Title & Trust Co. v. Johnson*, 268 Ill. App. 184 (1932).

after the act was in force.”¹⁸ Another division of the Appellate Court for the First District had previously held that it must not only take judicial notice of the ordinance of a municipality within the trial court’s jurisdiction, but that, although the ordinance was not stated by the pleading, the Appellate Court must pass on the validity of the ordinance to determine whether it is an adequate basis for a demurrer.¹⁹

So it would seem that although it followed the Supreme Court’s statement that matters of which the court should take judicial notice must first be called to the court’s attention in some way, the Appellate Court’s finding is not in accord with the concept of judicial notice established at common law, followed in many jurisdictions, and cited by text writers as the general rule—that the judge takes judicial notice of a fact or circumstance because he knows it officially, and that it need not be called to his attention by either pleading or evidence.

Although no previous case had so decided, it may be that the Appellate Court’s intention was to construe the judicial notice statute as permissive and to deny judicial notice where the validity of an ordinance is questioned. If so, it is fair to remember that there are a great many ordinances and court rules and that a mandatory construction of the statute requiring the trial court to take judicial notice under all circumstances of the ordinances of all municipalities and of the rules of all inferior courts within its jurisdiction might lead to practical difficulties. Hence, although the opinion leaves one somewhat confused in his attempt to reconcile the several appellate court decisions on judicial notice, it cannot be said that this opinion may not be justified on the grounds mentioned.

L. WHIDDEN

FORCIBLE ENTRY AND DETAINER—JUDGMENTS—APPLICABILITY OF PROVISIONS OF PRACTICE ACT FOR SUMMARY JUDGMENTS TO FORCIBLE ENTRY AND DETAINER PROCEEDINGS.—Section 11 of the Forcible Entry and Detainer Act as amended June 27, 1935,¹ has been construed for the first time by the Illinois Appellate Court in *Wainscott v. Penikoff*,² which holds that the section “means just what it says” and that consequently the provision of the Civil Practice Act providing for summary judgments applies to actions in forcible entry and detainer.

In the *Wainscott* case, the plaintiff filed a motion for a summary judgment supported by his affidavit, which asserted that the

¹⁸ *Capitol State Sav. Bk. v. Larson*, 255 Ill. App. 479 (1930).

¹⁹ *People ex rel. Krajci v. Kelly*, 279 Ill. App. 22 (1935).

¹ Ill. State Bar Stat. (1935), Ch. 57, ¶ 11.

² 287 Ill. App. 78, at p. 80, 4 N. E. (2d) 511 (1936).

action was brought to recover possession of certain described premises for which the plaintiff held a good lease, which was attached, that the affiant personally served a demand on the defendant for the premises and that by reason of these facts the plaintiff was entitled to possession and asked for judgment. The defendant moved to strike, claiming the motion was insufficient at law in that summary judgments were not applicable to actions for forcible entry and detainer since the forcible entry and detainer statute contains no express authority for such judgments.

Section 11 of the Forcible Entry and Detainer statute as amended reads "The provisions of the Civil Practice Act, and all existing and future amendments of said act and modifications thereof, and the rules now or hereafter adopted pursuant to said Act, shall apply to all proceedings hereunder in courts of record, except as otherwise provided in this Act."³

The provision of the Civil Practice Act applied is Section 57, the Summary Judgment Act,⁴ providing that, subject to rules, if the plaintiff in any action to recover possession of land shall file an affidavit on affiant's personal knowledge of the truth of the facts upon which his complaint is based, the court shall, upon plaintiff's motion, enter a judgment in his favor for the relief so demanded.

The court called attention to the fact that the plaintiff's affidavit must set forth with particularity the facts upon which his cause of action is based and shall consist not of conclusions but of such facts as would be admissible in evidence;⁵ that it was proper for defendant to test the sufficiency of plaintiff's affidavit and motion for summary judgment by a motion to strike;⁶ and that defendant might have prevented judgment by filing prior to the hearing an affidavit of merits showing he had a sufficiently good defence on the merits to entitle him to defend the action.⁷

L. WHIDDEN

INFANTS—CONTRACTS—ESTOPPEL TO PLEAD MINORITY BECAUSE OF FALSE REPRESENTATIONS AS TO AGE.—The Georgia Appellate Court has again indicated the changing attitude in respect to the liability *ex contractu* of an infant who fraudulently represents himself to be of age. In the case of *Clemons v. Olshine*¹ that court

³ Ill. State Bar Stat. (1935), Ch. 57, ¶ 11.

⁴ Ill. State Bar Stat. (1935), Ch. 110, ¶ 185.

⁵ Supreme Court Rule 15; Ill. State Bar Stat. (1935), Ch. 110, ¶ 238.

⁶ People for use of *Dyer v. Sanculius*, 284 Ill. App. 463, 2 N. E. (2d) 343 (1936).

⁷ Ill. State Bar Stat. (1935), Ch. 110, ¶ 185.

¹ 187 S. E. 711 (Ga. App., 1936).

held that an infant with a mature appearance, who induced a merchant to sell him a suit of clothes and a pair of shoes on credit by fraudulently representing that he was of age, was estopped by reason of his representation to set up his infancy as a defense to an action brought for the remainder of the purchase price.

A number of years ago this decision would have been looked upon as an extreme departure from the well settled law. But today law courts are rapidly recognizing the commercial need to protect merchants from the infant who attempts to use his infancy as a sword to perpetrate frauds upon innocent persons. Although this view is still in the minority at law, the majority of the courts of equity of the different jurisdictions which have been faced with the problem have denied the infant the right to disaffirm the contract.² Already, even at law, a number of jurisdictions, including New Jersey, Kentucky, Tennessee, Mississippi, Montana, New Hampshire, Wisconsin, South Carolina, Georgia, Nebraska and Texas, have recognized estoppel *in pais* against an infant who fraudulently induced another to part with property by a false representation that he was of age.³ The legislatures of four other jurisdictions, Iowa,⁴ Kansas,⁵ Washington,⁶ and Utah,⁷ have by statute taken away the right of the infant to disaffirm under such circumstances.

The tendency to adopt the estoppel theory is only natural. Today business is transacted on a much larger scale and any doctrine which promotes freedom in commercial transactions is looked upon with great favor. A number of years ago the business of the ordinary merchant was limited in scope and he knew personally most of the customers with whom he dealt; so the need

² "If an infant procures an agreement to be made through false and fraudulent representation that he is of age, a court of equity will enforce his liability as though he were an adult. . . ." Pomeroy's Equity Jurisprudence (Bancroft-Whitney Co., San Francisco, 1886), II, 464, sec. 945; Lewis v. Van Cleve, 302 Ill. 413, 134 N. E. 804 (1922); Stallard v. Sutherland, 131 Va. 316, 108 S. E. 568 (1921); Pemberton Bldg. & Loan Assn. v. Adams, 53 N. J. Eq. 258, 31 A. 280 (1895); International Land Co. v. Marshall, 22 Okla. 693, 98 P. 951 (1908).

³ La Rosa v. Nichols, 92 N. J. L. 375, 105 A. 201 (1918); Pinnacle Motor Co. v. Daugherty, 231 Ky. 626, 21 S. W. (2d) 1001 (1929); Tuck v. Payne, 159 Tenn. 192, 17 S. W. (2d) 8 (1929); Commander v. Brazil, 88 Miss. 668, 41 So. 497 (1906); Downey v. Northern Pac. Ry. Co., 72 Mont. 166, 232 P. 531 (1924); Hall v. Butterfield, 59 N. H. 354 (1879); Grauman, Marx & Cline Co. v. Krienitz, 142 Wis. 556, 126 N. W. 50 (1910); Floyd v. Page, 129 S. C. 301, 124 S. E. 1 (1924); Hood v. Duren, 33 Ga. App. 203, 125 S. E. 787 (1924); Klinck v. Reeder, 107 Neb. 342, 185 N. W. 1000 (1921); First State Bank v. Edwards, 245 S. W. 478 (Texas Civ. App., 1922).

⁴ Iowa Code (1927), sec. 10494.

⁵ Kansas Rev. Stat. (1923), secs. 38-103.

⁶ Rem. Comp. Stat. of Wash. (1922), sec. 5830.

⁷ Compl. Laws of Utah (1917), sec. 3957.

to protect him against fraudulent practices was comparatively small.

One of the arguments against the estoppel theory is that the right of avoidance of his contracts is given the infant to protect him not only from persons who attempt to take advantage of his immaturity, but also to protect him from his own "imprudence and folly." Another argument is that the person dealing with the infant is sufficiently protected by reason of the infant's liability in an action in tort for fraud and deceit for falsely representing his age.⁸

When it is considered that before most of the courts recognizing the estoppel theory will hold the infant liable on the contract, it must be shown that the representation was fraudulent and intentional, that the infant was of sufficient maturity of appearance as to justify a reliance on his representation as to his age, and that property must actually be parted with on the strength of the representation, the application of the doctrine of estoppel *in pais* will not seem so harsh as it would appear at first glance.

That the Civil⁹ and Spanish¹⁰ law apply the estoppel theory against an infant is a strong argument in its favor. Even courts that have refused to apply it have stated that the estoppel theory is the preferable view, but have refused to follow it on the grounds that the common law "from time out of mind" was to the contrary, and assert that the proper method of changing the law is by act of the legislature.¹¹

Despite the recognized merit of the estoppel view, the view of a majority of the courts is still considered to be to the contrary.¹² The recent abolition of the forms of actions in many of the states, which permits a joinder of contract and tort claims, may well tend to strengthen the estoppel theory—perhaps even fortify it sufficiently to cause it to become the prevailing view in this country. That such a result is preferable is generally recognized.

G. H. CRANE

MASTER AND SERVANT—WORKMEN'S COMPENSATION ACTS—
NON PROFIT CORPORATION'S RENTING OF BUILDING TO OBTAIN
REVENUE FOR ITS PURPOSES AS ENGAGING IN BUSINESS OF MAIN-

⁸ *Fitts v. Hall*, 9 N. H. 441 (1838); *Rice v. Boyer*, 108 Ind. 472, 9 N. E. 420 (1886).

⁹ *Doinat*: The Civil Law and Its Natural Order (Little & Brown, Boston, 1850), I, 939, Part 1, Bk. IV, Tit. 7, Sec. 2, par. 2378.

¹⁰ Law 6, Tit. 19, Partidas 6th.

¹¹ *Sternlieb v. Normandie Nat. Sec. Corp.*, 263 N. Y. 245, 188 N. E. 726 (1934).

¹² *Sims v. Everhardt, Ex'r.*, 102 U. S. 300, 26 L. Ed. 87 (1880); *Spencer v. Carr*, 45 N. Y. 406 (1871); *Wieland v. Kobick*, 110 Ill. 16 (1884).

MAINTAINING STRUCTURE WITHIN WORKMEN'S COMPENSATION ACT.—The Supreme Court of Illinois was recently called upon again to construe Section 3 of the Illinois Workmen's Compensation Act¹ in the case of the *National Alliance of Bohemian Catholics v. Industrial Commission*,² where the question was squarely before the court. The construction of the act is the only part of the case treated in this note. The National Alliance had been formed as a corporation not for profit, and the object thereof was stated as "the encouragement of educational development and the promotion of the welfare of its membership." It had purchased a mortgage on an apartment building as an investment for part of its funds and upon default it had acquired title to the property by foreclosure proceedings and was renting the apartment for profit, an act clearly outside its charter. It became necessary to have some work done on the building and the job was given to an independent contractor. One of the contractor's workmen was injured by the falling of a scaffold, and in the course of litigating his claim this question arose. The case is one which does not arise often where such a corporation is involved. The court decided the question on the facts presented and concluded that the National Alliance was engaged in the business of maintaining a structure and, hence, engaged in an extra hazardous occupation. In regard to the amount of property owned, the decision follows *Jacobi v. Industrial Commission*,³ *Rogalski v. Industrial Commission*,⁴ *Davis v. Industrial Commission*,⁵ and *Storrs v. Industrial Commission*,⁶ and it cites the case of *Walsh v. Industrial Commission*⁷ with approval. The case is distinguished from *Lombard*

¹ Smith-Hurd's Ill. Rev. Stat. (1935), Ch. 48, § 139. The statute by its terms applies to all those: "... engaged in any department of the following enterprises or businesses which are declared to be extra hazardous, namely: 1. The erection, maintaining, removing, remodeling, altering or demolishing of any structure . . ."

² 364 Ill. 249, 4 N. E. (2d) 362 (1936).

³ 342 Ill. 210, 173 N. E. 748 (1930). The plaintiff owned a three apartment building. He lived in one of the apartments and rented the other two for revenue. Held, he was engaged in the business or enterprise of maintaining a structure, and hence within the scope of the act.

⁴ 342 Ill. 37, 173 N. E. 813 (1930). The court held that a person who owned several adjacent buildings and rented apartments and stores for income came within the act.

⁵ 297 Ill. 29, 130 N. E. 333 (1921). Davis was engaged in the hardware business and owned some apartment buildings as investments; it was held that he came under the Workmen's Compensation Act as contemplated by section 3.

⁶ 285 Ill. 595, 121 N. E. 267 (1918). The plaintiff operated several buildings for himself and for members of his family, it was decided that he was engaged in an extra hazardous business as defined by section 3 of the act.

⁷ 345 Ill. 366, 178 N. E. 82 (1931). Held, where a party was in the business of making loans on real estate, taking an assignment of the borrower's

*College v. Industrial Commission*⁸ on the facts (although both corporations were not for profit and for the same general purpose) in that here the plaintiff derived revenue through renting apartments to third persons, whereas the Lombard College did not. The instant case is unquestionably sound inasmuch as in all the cases construing the language "engaged in" the test seems to be whether or not the building or buildings on which the work was done return any financial gain to the owner.

K. S. MAINLAND

MORTGAGES — FORECLOSURE BY ACTION — MORTGAGEE'S INTENTIONALLY OMITTING OWNER OF EQUITY OF REDEMPTION FROM HIS ACTION OF FORECLOSURE AS BAR TO SUBSEQUENT FORECLOSURE. — In an action to remove a cloud from title, the Chancery court of New Jersey, in the recent case of *Indiana Investment Company v. Evens*,¹ removed as a cloud from complainant's title, a mortgage that had been foreclosed in an action in which the complainant, who owned the equity of redemption, was intentionally omitted. The facts were unusual in that the complainant had intervened in the foreclosure action asking to be made a party defendant, but on the objection of the mortgagee he was dismissed from the case. Before dismissing him the trial court warned the mortgagee and his solicitor of the effect of proceeding to a decree without the equity owner but they persisted in their objection and the order of dismissal was made. The mortgagee purchased the property at the sale.

The decision of the court holding that the mortgage was now only a cloud on the complainant's title was based on the twofold theory that the mortgagee was estopped by his acts from asserting any rights under the mortgage against the complainant, and that the foreclosure merged the mortgage and the debt into the decree, thus barring the right to bring a second action of foreclosure.

If a right existed in the mortgagee to enforce the mortgage or the decree against the land on any theory, the court should not have removed it as a cloud, for if the claim sought to be removed

contract for purchase as security, thereby getting an equitable interest in several pieces of property he was engaged in the business of maintaining a structure within the contemplation of the act.

⁸ 294 Ill. 548, 128 N. E. 553 (1920). The college owned a house which was situated on the campus and was used as a residence by its president. There was a gas leak, and a plumber was called. The plumber's helper was injured, and in the ensuing litigation it became material to determine whether or not the college was engaged in the business, occupation, or enterprise of building, maintaining, or repairing a structure. It was decided that it was not so engaged.

¹ 187 A. 158 (N. J. Eq., 1936).

is valid and may be enforced either at law or in equity it can not be said to be a cloud.²

The court did not state whether the estoppel was an equitable estoppel or estoppel by record. In Illinois to constitute an equitable estoppel the person asserting it must have done or omitted some act to his detriment, or changed his position, so that it would be inequitable for the other party to deny his statement or act.³ The complainant here can hardly be said to have suffered a detriment or been misled into changing his position as a result of the mortgagee objecting to allow him to intervene in the foreclosure proceedings.

In support of its finding that the mortgagee would not have a right to bring a second action of foreclosure the court cited the cases of *Shepard v. Barrett*,⁴ *Hudson Trust Company v. Boyd*,⁵ and *Elmora West End Building & Loan Association v. Strede*,⁶ all New Jersey cases. None of these cases arose on similar facts and support the decision only inferentially. In the Shepard case the right of a mortgagee to bring a second action of strict foreclosure against a party inadvertently omitted from the first action was upheld, although the court intimated that if the omission had not been inadvertent the result might have been otherwise. In both the Elmora case and the Hudson Trust Company case no question of omission of parties was presented. They were cases in which the parties to the decree sought to have the decree vacated after they had reached an agreement to continue the relation of mortgagor-mortgagee. The court in those cases held that the decree was final as to the parties and would not be opened or vacated to bring the mortgage back into existence.

No notice was taken of the case of *Surety Building & Loan Association v. Risack*,⁷ decided in the same court eighteen months before. In that case, the owner of an undivided one-half interest in the land, and the owner of a dower interest in the other one-half, were omitted from the foreclosure suit. No statement as to whether they were omitted by design or error appears in the statement of the case. While it was held that the order of the lower court, which vacated the decree and allowed an amended bill to be filed in order to include these parties, was error, the court held that a second suit would lie to foreclose the interests not affected by the first action.

² *Rigdon v. Shirk*, 127 Ill. 411, 19 N. E. 698 (1889).

³ *Powers v. Wells*, 244 Ill. 558, 91 N. E. 717 (1910).

⁴ 84 N. J. Eq. 408, 93 A. 852 (1915).

⁵ 80 N. J. Eq. 267, 84 A. 715 (1912).

⁶ 100 A. 344 (N. J. Eq., 1917).

⁷ 118 N. J. Eq. 425, 179 A. 680 (1935).

A search for cases in Illinois reveals none on the same facts but indicates that a different result might have been reached had the case arisen here. In *Rodman v. Quick*⁸ it was held that a purchase at a foreclosure sale under a proceeding which was irregular for want of proper parties amounts to no more than an entry for condition broken, and if a stranger becomes a purchaser, he will, as to those having an equity of redemption and not made parties, take an equitable assignment of the mortgage.

The sale of land under a foreclosure proceeding to which the owner of the equity of redemption had not been made a party was held in *Walker v. Warner*⁹ to be a valid transfer of the legal title to the purchaser which did not affect the owner's right to redeem.

A sale in Illinois has been held to be a transfer of all the interest of both the mortgagor and the mortgagee;¹⁰ so if the mortgagor were not a party, a sale would at least transfer the interest of the mortgagee in the premises. Again in *Alsup v. Stewart*¹¹ it was said that it was not the mortgage lien that was sold, but the property itself, the legal title passing at the sale subject to the right of redemption of owners of the equity not made parties to the suit.

In sustaining the right of a mortgagee to bring a second action to foreclose the interests of a judgment creditor of the owner of the equity of redemption, the Illinois Appellate Court said in answer to the defendant's contention that the mortgage had merged with the first decree, "Defendant can not be permitted to assume inconsistent positions. He cannot be heard to say that the former decree of foreclosure is void and at the same time assert that the mortgage has merged in it."¹²

F. B. ANGER

MORTGAGES — PRIORITIES — ASSIGNMENT OF PART OF NOTES AS CREATING PRIORITIES OF ASSIGNEES OVER ASSIGNOR.—In *Domeyer v. O'Connell*,¹ the Supreme Court of Illinois recently decided that the mortgagee's assignment of notes bearing the same maturity date and containing no parity clause does not give the assignees an equitable right to a priority over the notes retained by the mortgagee in case the proceeds of the sale of the mortgaged property is insufficient to pay all the notes, but that the assignees and

⁸ 211 Ill. 546, 71 N. E. 1087 (1904).

⁹ 179 Ill. 16, 53 N. E. 594 (1899).

¹⁰ *Lightcap v. Bradley*, 186 Ill. 510, 58 N. E. 221 (1900).

¹¹ 194 Ill. 595, 62 N. E. 795 (1902).

¹² *Mullholland v. Landise*, 248 Ill. App. 237, 1 N. E. (2d) 255 (1936).

¹ 364 Ill. 467, 4 N. E. (2d) 830 (1936).

the mortgagee share pro rata in the proceeds of the insufficient security.

In the instant case, John Wetzel and his wife executed to the First Trust and Savings Bank of Sterling thirty-two promissory notes aggregating thirty-five thousand dollars and bearing the same maturity date. The notes were secured by a mortgage to the bank. Neither the notes nor the mortgage contained any parity clause as to payment. Prior to maturity, all except six thousand dollars of the notes were sold and assigned to various assignees and were indorsed without recourse. When the mortgagors defaulted, the assignees filed their bill for foreclosure and prayed that the proceeds of the sale be applied pro rata to the payment of all the notes except those remaining in the hands of the mortgagee, and that the notes of the assignees be paid in full before any of the proceeds be applied on the notes of the mortgagee.

The plaintiffs based their claim upon two grounds. First, they contended that they were entitled to a priority, because, they said, there was an implied agreement to that effect in the contract of assignment; and second, they contended that the very act of assignment created such a preference. It may be noted that at common law when one assigned a note with a qualified endorsement, no warranty was implied that the note would be paid;² nor does such a warranty exist under Section 65 of the Negotiable Instruments Act, as the court pointed out.³

The second contention is one about which there is much diversity of opinion. One of the earliest cases expressing the view adopted by the Illinois Supreme Court in the instant case, is the case of *Donley v. Hays*, decided by the Supreme Court of Pennsylvania in 1828.⁴ In that case various bonds, maturing at different

² The Illinois Supreme Court has so held. See *Condrey v. West*, 11 Ill. 146 (1849); *Robinson v. McNeill*, 51 Ill. 225 (1869); *Strong v. Leoffler*, 85 Ill. 73 (1877).

³ "Every person negotiating an instrument by delivery or by a qualified indorsement warrants:

1. That the instrument is genuine and in all respects what it purports to be.

2. That he has a good title to it.

3. That all prior parties had capacity to contract.

4. That he has no knowledge of any fact which would impair the validity of the instrument.

But when the negotiation is by delivery only, the warranty extends in favor of no holder other than the immediate transferee."—Negotiable Instruments Act, Sec. 65; Smith-Hurd's Ill. Rev. Stat. (1935), Ch. 98, § 85.

⁴ *Donley v. Hays*, 17 Serg. & Rawle (Pa.) 400 (1828), affirmed in *Hancock's Appeal*, 34 Pa. St. 155 (1859). In this case there were eight bonds secured by a mortgage. Five of these bonds had been assigned. Upon a default in payment by the mortgagor, there was a foreclosure and

dates, were given no preference even though the assignees had acquired them at different times, but it was held that they were entitled to a pro rata dividend of the proceeds according to the amount of their bonds. This view has become known as the pro-rata rule and has been adopted by a number of jurisdictions.⁵ In that case there was a dissenting opinion by Mr. Justice Gibson which is expressly adopted and followed by the leading case in the United States in support of the view that the act of assignment gives to the assignee a priority over the assignor because of the assignment.⁶ This view is known as the *pro-tanto* rule.

The latter theory, upon examination, gives rise to a peculiar situation. A mortgagee by assigning one note, would thereby assign, not only a proportionate share of the debt, but also so much of the security as would be necessary for the payment of the note; all of it if that would be required. Thus we have the situation where the first assignee would have a note which would have a greater value attached to it (a value which it originally did not have) than would the remaining notes. However, if there

the money was in the hands of the sheriff. Because the property was insufficient security, the bond holders brought this amicable action for money had and received to determine their rights to the money as between the assignees themselves.

⁵ Lovell v. Cragin, 136 U. S. 130, 10 S. Ct. 1024, 34 L. Ed. 372 (1890); Champion v. Hartford Inv. Co., 45 Kan. 103, 25 P. 590, 10 L. R. A. 754 (1891); State Bank of O'Neill v. Mathews, 45 Neb. 659, 63 N. W. 930 (1895); Orleans County Nat. Bank v. Moore, 112 N. Y. 543, 20 N. E. 357 (1889); Lawson v. Warren, 34 Okla. 94, 124 P. 46 (1912); Appeal of Fourth Nat. Bank, 123 Pa. St. 473, 16 A. 779 (1889); Gorden v. Hazzard, 32 S. C. 351, 11 S. E. 100 (1890).

⁶ Cullum v. Erwin, Admr., 4 Ala. 452 (1842). The mortgagee assigned five of a series of six notes. The assignees claimed a right of priority over the assignor in the proceeds of the sale of the mortgaged property. The court so held. The Illinois Supreme Court, in the instant case, commenting on this and similar cases, said these cases "... reflect the influence of the old common-law theory of a mortgage, which conferred upon the mortgagee the right to immediate possession unless there be special terms giving to the mortgagor the right to reserve possession until default. By reason of this fact, when the mortgagee assigned an interest in the debt—which he had difficulty in doing without consent of or notice to the mortgagor—he was deemed to have assigned not the entire right of possession, but a co-parcenary interest therein, and the assignee having waived the right to co-possession of the premises, the assignor mortgagee was held to account to him for his portion of the rent. Out of this grew the theory that the mortgagee, on assignment of a part of the mortgage debt, became trustee for the benefit of such assignee and surety for the payment of the assigned portion of the debt. It was but natural, therefore, that courts of equity found in such relationship an equity in favor of the assignee of a part of the mortgage debt as against the mortgagee assignor. Such are no longer the characteristics of a mortgage. Not only does the mortgagor retain possession, but even on default the mortgagee can only apply to a court of equity to foreclose his lien. The security is pledged to pay all notes issued under the mortgage." See also Farmer's Savings Bank v. Murphree, 200 Ala. 574, 76 So. 932 (1917).

had been no assignment, all of the notes would have had the same value. It is thus placed within the power of the mortgagee to make valueless, by his own act, that which formerly had a value. So, if upon foreclosure the property was insufficient security for the entire debt—was only enough for the one note—the remaining notes, whether remaining in the hands of the mortgagee or subsequently assigned, would be worthless.

In cases where more than one of the notes have been assigned, all other things being equal, a few states have held that the one prior in time is entitled to a preference.⁷ Applying the view that prior in time is prior in right, to negotiable paper secured by a deed of trust or a mortgage would seem to make business almost impossible and would open wide the door to uncertainty if not fraud. Other states adopting the *pro-tanto* rule hold that it applies only as between assignor and assignee and that as between assignees there is no preference and all will share *pro rata*.⁸ This theory is likewise objectionable for the reasons previously given. In either situation, the logic for so holding is more or less obscure.

One jurisdiction adopting the *pro-tanto* rule as between the assignor and assignee and the *pro-rata* rule as between assignees bases its view on the theory of an equitable estoppel.⁹ The contention is that the holder of a series of notes secured by the same mortgage or lien cannot transfer one or some of the notes and receive the price, and thereafter compete with his transferee in a distribution of the proceeds of a sale of the mortgaged property. In the case of *Butler v. Clarke*¹⁰ the Louisiana court said, "It would be altogether contrary to good faith that the vendor of part of the debt ceded, after having received the price, should come in, by his own act and prevent his assignee from recovering the sum disbursed by him." This theory apparently overlooks

⁷ *Brewer v. Atkison*, 121 Ala. 410, 25 So. 992 (1899); *McClintock v. Wise*, 25 Grat. (Va.) 448, 18 Am. Rep. 694 (1874); *Notes* 38 Am. Dec. 441; 13 L. R. A. 296; 24 L. R. A. 804; 42 L. R. A. (N. S.) 199 et seq.; *Williams v. Gifford*, 139 Va. 779, 124 S. E. 403 (1924). In the case of *Irvin v. Citizen's Bank of Hattiesburg, Miss.*, 209 Ala. 211, 95 So. 897 (1923), the court said, "The assignment of notes secured by a mortgage is *pro tanto* an assignment of the mortgage security and assignees have priority of payment out of the fund produced by the mortgage in the order in which the assignments are made and not according to the maturity of the notes."

⁸ *Burhaus v. Mitchell*, 42 Mich. 417, 4 N. W. 178 (1880); *Smith v. Bowne*, 60 Ga. 484 (1877); *Campbell v. Johnston*, 4 Dana (Ky.) 177, 178 (1836); *Dixon v. Clayville*, 44 Md. 573 (1876); *Wilson v. Eigenbrodt*, 30 Minn. 4, 13 N. W. 907, 908 (1882); *Bank of England v. Tarleton*, 23 Miss. 173 (1851); *Keyes v. Wood*, 21 Vt. 331 (1849).

⁹ *Leonard v. Brooks*, 158 La. 1032, 105 So. 54 (1925); *Adams v. Lear*, 3 La. Ann. 144 (1848); *Ventress v. Creditors*, 20 La. Ann. 359 (1868).

¹⁰ *Butler v. Clarke*, 44 La. Ann. 148, 10 So. 499 (1892).

the fact that the mortgagee has also parted with his money with respect to the balance of the debt remaining in his hands. It is true that had the mortgagee assigned the entire debt he would be estopped to assert any right prior to his assignee, but it does not seem to follow that the same is true when only a part of the debt is assigned. Rather the assignor and assignee are in the position of being joint-mortgagees and as such entitled to share pro rata in the proceeds. Both should ratably bear any loss.

Another basis for holding that priority exists, which is foreign to the Common Law but not unfamiliar to the Civil Law, is that of quasi-subrogation.¹¹ In such a case the contention is that the assignment is a part payment of the debt, thus operating as a quasi-subrogation of the assignee to the rights of the assignor in the thing ceded to the extent necessary to secure his reimbursement. It is fundamental that the subrogee can have no greater rights than had his subrogor. To subscribe to this doctrine of quasi-subrogation is to reverse the principle just stated. The subrogor had a right to have all of the debt paid and he also assumed the risk of the property being insufficient security for the payment of the debt and thus having the debt only proportionately paid. However, under this theory this would not be true as the subrogee would have an absolute right to have his proportion of the debt paid irrespective of the fact that the property might be insufficient security for the entire debt. He would assume no risk, the risk all being on the subrogor. The subrogee would hold a much better position than that held by his subrogor originally. If the property would not be sufficient to reimburse the subrogee, it would logically follow that since his right is an absolute one, he would have a cause of action against the subrogor for the difference between the amount received and the amount paid out. The subrogor would thus be placed in the unenviable position of guaranteeing the payment to the subrogee.

It thus seems that the preferable view is the one adopted by the Illinois Supreme Court in the instant case, for in the absence of a parity clause either in the notes or in the mortgage,¹² where the notes all bear the same maturity date,¹³ there is no reason

¹¹ Ibid.

¹² *Humphreys v. Morton et al.*, 100 Ill. 592 (1881).

¹³ It is well settled in Illinois that when several notes are secured by one mortgage, the assignee of the one first due has priority over the holders of the others, and can foreclose and sell to satisfy his claim. The holders of the other notes can redeem in succession, according to their priority, as they become due. This ruling rests upon the fact that the holder of the note first maturing, without being vested with any special equity by reason of the capacity in which he holds the paper—as assignee, for instance—may foreclose for non-payment, without waiting for the succeeding notes to mature.

why they should not share pro rata in the proceeds of the sale from the mortgaged property whether in the hands of the mortgagee or in the hands of assignees.

H. N. LINGLE

MUNICIPAL CORPORATIONS—TORTS—LIABILITY FOR NEGLIGENCE IN OPERATING A MUNICIPAL AIRPORT WITHOUT THE CORPORATE LIMITS.—In *Mayor, etc., of Savannah v. Lyons*,¹ the Court of Appeals of Georgia, Second Division, held on demurrer that the operation of an airport by a city without its corporate limits is a governmental function, from which results no liability for injuries caused by the fault of its employees.

Early one dark morning plaintiff was traveling on a road encircling a park at one end of the landing field and was thrown from his motorcycle and injured when he struck a defect in the road. It was conceded that the beacon light in the center of the park cast no light on the dangerous holes so as to put the plaintiff on guard and that the city was chargeable with notice of the defects.

The plaintiff contended that since the city derived revenue by leasing the use of the landing field to a private concern and by leasing oil and gas concessions, it was operating a private business and so was liable in its proprietary capacity for the negligence of its agents.

The defendant insisted not only that the facts showed in law the exercise of a governmental function, but that since the land on which the park and road were located was acquired subsequent to the acquisition of the landing field proper, the park was not a part of the airport and hence the city's act of maintaining a road outside of the corporate limits was ultra vires and void. The latter contention was overruled on the ground that the city acquired the land by condemnation for airport purposes, pursuant to statute and that it was intended that the park and landing field be one unit under the control of the city engineer.

The court decided that plaintiff failed to show that the airport was maintained primarily for revenue so as to make its operation a proprietary function. It further asserted that the statute authorizing such airports provided that they should be

The power to do this implies priority of lien in the notes first falling due. *Vansant v. Allmon et al.*, 23 Ill. 26 (1859); *Gardner v. Diederichs*, 41 Ill. 158 (1866); *Walker v. Dement*, 42 Ill. 272 (1866); *Funk v. McReynolds' Adm'rs.*, 33 Ill. 482 (1864); *Schultz v. Plankinton Bank*, 141 Ill. 116, 30 N. E. 346 (1892); *In re Estate of Lalla*, 281 Ill. App. 124, affirmed in 362 Ill. 621, 1 N. E. (2nd) 50 (1935).

¹ 189 S. E. 63 (Ga. App., 1936).

operated for public purposes; so the legislature intended to characterize them as governmental agencies. Then too, the city's amended charter contained the words "landing or flying field or park" so many times as to indicate that the field was to be considered as a park, which is a governmental function.

A parallel situation could arise in Illinois, because such cities, towns, or villages as qualify under the statute² are permitted to operate airports within or without their corporate limits and to lease any parts thereof, but they must acquire them for public purposes.

R. F. OLSON

TAXATION—INHERITANCE TAX—EXEMPTION OF BEQUESTS TO LOCAL CHARITY FOR USE PARTLY FOR BENEFIT OF OTHER STATES.—In the case of the *People v. The First National Bank of Chicago*,¹ the Supreme Court of Illinois in construing Section 28 of the act to tax gifts, legacies, etc.,² decided, first, that an organization to be entitled to an exemption under this section of the statute need not be incorporated, and second, that the benefit to be derived from a charitable trust does not have to be restricted to persons residing within the territorial jurisdiction of the state. In this case, Andrew Legge, a resident of Du Page County, Illinois, by will, left \$500,000 to trustees of the Farm Foundation, pursuant to a trust agreement made by the testator and others for the improvement of the economic, social, educational, and cultural conditions of rural life in the United States. Article 2 of the said trust agreement placed the activities of the foundation, except the handling of the funds, in a board of trustees; Article 3 provided that the corporate trustee, the First National Bank of Chicago, should hold title to, manage, invest, and distribute the property and income of the foundation. There were twenty-one trustees, eight of whom were residents of Illinois; the property was situated in Illinois; the office of the Foundation was in Chicago and all of the meetings had been held there.

² Smith-Hurd's Ill. Rev. Stat. (1935), Ch. 34, §§ 642a-642n, Act approved March 28, 1934. See also Ch. 34, §§ 621h-621q, Act approved July 11, 1935.

¹ 364 Ill. 262, 4 N. E. (2d) 378 (1936).

² Smith-Hurd's Ill. Rev. Stat. (1935), Ch. 120, § 401: "When the beneficial interests of any property or income therefrom shall pass to or for the use of any hospital, religious, educational, bible, missionary, tract, scientific, benevolent or charitable purpose, or to any trustee, bishop or minister of any church or religious denomination, held and used exclusively for the religious, educational or charitable uses and purposes of such church or religious denomination, institution or corporation, by grant, gift, bequest or otherwise, the same shall not be subject to any such duty or tax, but this provision shall not apply to any corporation which has the right to make dividends or distribute profits or assets among its members."

In respect to the first point, states having statutes similar to ours have quite uniformly held that it is unnecessary for a charity to be incorporated to be entitled to an exemption.³ In the instant case, it was contended that the Foundation was analogous to a foreign corporation, and in view of the holdings of the Supreme Court of Illinois⁴ with regard to bequests to foreign corporations, that this bequest was not entitled to an exemption. The court, answering this contention in the negative, said: "A testamentary trust of movables is administered by the trustee according to the law of the state of the testator's domicile at the time of his death, unless the will shows an intention that the trust should be administered in another state, as it is natural to suppose that the trustee intended the trust to be administered in the same place in which his estate was to be administered and under the direction of the courts of that state." In an unincorporated society, it is sufficient to give the court jurisdiction, if one or more of the trustees are amenable to the jurisdiction and the property is located within the territorial limits of the state.

³ In California, the legatee of a bequest for the benefit of charity need not be incorporated. See California Civil Code, par. 1313; *In re estate of Winchester*, 133 Cal. 271, 65 P. 475, 54 L. R. A. 281 (1901); *In re Irwin's Estate*, 196 Cal. 366, 237 P. 1074 (1925). *In re Curtis' Estate*, 82 Vt. 445, 92 A. 965 (1915); the testatrix left property in trust, to three trustees, for educational purposes. The question before the court was whether the bequest was taxable because the trustees were not incorporated. The court held that under the statutes of Vermont providing for the imposition of an inheritance tax and exempting therefrom any charitable or educational society or institution created and existing under and by virtue of the laws of the state and having its principal office therein, the legislature intended to levy such tax on all foreign, and to exempt all domestic, charitable societies and institutions, whether incorporated or not.

⁴ *People v. Missionary Society*, 303 Ill. 418, 135 N. E. 749 (1922). The court said, "The amendatory act contains no language that indicates that it was the legislative intent that its provisions should apply to corporations created under the laws of another state of the United States. The rule of construction accepted by this court is, that an act of the legislature granting powers, privileges or immunities to corporations must be held to apply only to corporations created under the authority of this state and over which this state has the power of visitation and control, unless the intent that the act shall apply to other than domestic corporations is plainly expressed in the terms of the act."

In re Estate of Speed, 216 Ill. 23, 74 N. E. 809 (1905). This rule is followed in other jurisdictions. See *In re Prime's Estate*, 136 N. Y. 347, 18 L. R. A. 713, 32 N. E. 1091 (1893); *In re Rothschild's Estate*, 71 N. J. Eq. 210, 63 A. 615 (1906), affirmed in *Rothschild's Estate*, 72 N. J. Eq. 425, 65 A. 1118 (1907); *Humphreys v. State*, 70 Ohio St. 67, 70 N. E. 957, 65 L. R. A. 776, 101 Am. St. Rep. 888 (1904); *In re Hickok's Estate*, 78 Vt. 259, 62 A. 724 (1906); *Cumberland Presbyterian Church v. Burbank*, 199 Iowa 739, 202 N. W. 834 (1925). However, in a few jurisdictions, the rule is otherwise. See *Sage's Ex'rs v. Commonwealth*, 196 Ky. 257, 244 S. W. 779 (1922); *In re Frain*, 141 La. 932, 75 So. 847 (1917); *In re Fiske's Estate*, 178 Cal. 116, 172 P. 390 (1918).

Previous to the decision in the instant case, with respect to the second point, it had been contended by some that the benefit to be derived from such a bequest had to be bestowed exclusively upon the people residing within the territorial limits of the state to render such bequest exempt under Section 28 of the Inheritance Tax Act.⁵ In support of this contention, the case of *People v. O'Donnell*⁶ was relied on. In that case the court, in determining the intent of the legislature with regard to this particular section, indicated that such an exemption was a loss of revenue to the state and in return for this loss the state would be compensated through the charity by being relieved from a burden which it would otherwise have. Similar statutes in other states have been given such an interpretation.⁷

In deciding *People v. First National Bank*,⁸ the court has settled this question by holding that the benefit does not need to be used exclusively within the territorial limits of the state.⁹ The fact that a part of the benefit to be derived from the fund will go to the residents of this state is sufficient to entitle the fund to an exemption. While the court does not indicate just what part is necessary to entitle it to an exemption, it would seem that a substantial part must be used within the territorial limits of the state. However, one jurisdiction has held one-forty-eighth of the expenditures to be a substantial part.¹⁰ Some jurisdictions have held such bequests to be exempt regardless of the benefit con-

⁵ Regulations in re Illinois Inheritance Tax Law for 1934, issued by the Attorney-General of Illinois, at page 18.

⁶ 327 Ill. 474, 158 N. E. 727 (1927). One Patrick D. Gill, a resident of Chicago, Illinois, left \$10,000 to the Catholic Bishop of the Diocese of Nashville, Tennessee, for the purpose of educating young men for the priesthood in said diocese and to the respective bishops of the dioceses of Mobile, Alabama, Natchez, Mississippi, Oklahoma City, Oklahoma, Corpus Christi, Texas, and San Antonio, Texas, the sum of \$5,000 each for the purpose of educating young men for the priesthood in their respective dioceses. None of the money was to be spent within the territorial jurisdiction of Illinois. This case may be distinguished from the instant case in this respect.

⁷ Accord: In re Prime's Estate, 136 N. Y. 347, 32 N. E. 1091 (1893); In re Quirk's Estate, 257 Mo. 422, 165 S. W. 1062 (1914); Morgan v. Atchison, T. & S. Fe Ry. Co., 116 Kan. 175, 225 P. 1029 (1924); Minot v. Winthrop, 162 Mass. 113, 38 N. E. 512 (1894); In re Hickok's Estate, 78 Vt. 259, 62 A. 724 (1906).

⁸ 364 Ill. 262, 4 N. E. (2d) 378 (1936).

⁹ The court says: "There is no statute, and we know of no declared policy of the state, that a charitable institution organized in this state shall limit its field of usefulness to the territorial limits of the state under penalty of taxation."

¹⁰ Tax Commission of Ohio v. American Humane Education Society, 42 Ohio App. 4, 181 N. E. 557 (1931). This was concerned with a bequest to a foreign corporation which would bestow one-forty-eighth of the benefit within Ohio. The court held that under the statute it was entitled to an exemption.

ferred upon their citizens.¹¹ But in Illinois, when none of the benefit will go to residents of Illinois, the Supreme Court has held that there is no exemption.¹²

H. N. LINGLE

WITNESSES—COMPETENCY—EFFECT OF STATUTE REMOVING DISQUALIFICATION OF HUSBAND OR WIFE.—The removal “in all civil actions” of the incompetency of husband and wife to testify for and against each other (except in certain instances) by the amendment in 1935 of Section 5 of the Illinois Evidence Act,¹ has been interpreted by the Illinois Appellate Court as being limited in scope. In the case of *In re Estate of Teehan*² that court held that despite the use of the phrase “in all civil actions” in the amendment, a husband or wife of a party to a suit brought by or against an administrator, executor, and the like, is still an incompetent witness within the meaning of Section 2 of the same act.³

In the case in question the executor of the estate of Teehan appealed from an order of the Circuit Court allowing a claim against the estate. The ground for the appeal was that the Circuit Court erred in permitting the wife of the claimant to testify. To support his contention the executor cited *Treleaven v. Dixon*⁴ and several other Illinois cases⁵ which held that the spouse of a party to an action brought or defended by an executor, administrator, etc., was an incompetent witness because he or she was

¹¹ See *In re Smith's Estate*, 144 Ore. 561, 25 P. (2d) 924 (1933); *State v. New York Yearly Meeting of Friends*, 61 N. J. Eq. 620, 48 A. 227 (1901). These holdings are due to peculiar statutes in the respective states.

¹² *People v. Merchants Trust Co.*, 328 Ill. 223, 159 N. E. 266 (1927).

¹ “In all civil actions, husband and wife may testify for or against each other, provided that neither may testify as to any communication or admission made by either of them to the other or as to any conversation between them during coverture, except in actions between such husband and wife, and in actions where the custody or support of their children is directly in issue, and as to matter in which either has acted as agent for the other.” *Smith-Hurd's Ill. Rev. Stat.* (1935), Ch. 51, § 5.

² 287 Ill. App. 58, 4 N. E. (2d) 513 (1936).

³ “No party to any civil action, suit or proceeding, or person directly interested in the event thereof, shall be allowed to testify therein of his own motion, or in his own behalf, by virtue of the foregoing section, when any adverse party sues or defends as the trustee or conservator of any idiot, habitual drunkard, lunatic or distracted person, or as the executor, administrator, heir, legatee or devisee of any deceased person, or as guardian or trustee of any such heir, legatee or devisee, unless when called as a witness by such adverse party so suing or defending, and also except in the following cases, namely . . .” *Smith-Hurd's Ill. Rev. Stat.* (1935), Ch. 51, § 2.

⁴ 119 Ill. 548, 9 N. E. 189 (1886).

⁵ *Evans v. Tabor*, 350 Ill. 206, 182 N. E. 809 (1932); *Pyle v. Oustatt*, 92 Ill. 209 (1879); *Craig v. Miller*, 133 Ill. 300, 24 N. E. 431 (1890).

"directly interested in the event thereof." To meet this argument the claimant contended that the amendment of Section 5 of the Evidence Act purported to remove the incompetency of husband and wife "in all civil actions" and that, therefore, the inconsistent provision of Sec. 2 (as interpreted by the Illinois Courts) was repealed by implication.

The Appellate Court held that the wife was an incompetent witness and the admission of her testimony constituted reversible error. The court held that repeal by implication is little favored in the law and will not be permitted unless such was the evident intention of the legislature.⁶ It stated that despite the use of the phrase "in all civil actions" in the amendment to Section 5, it would nevertheless interpret the section as being limited by excepting therefrom testimony of one spouse in actions falling within the prohibition of Section 2. Such a construction gives effect to both sections and follows the rule that a construction which permits harmony between different sections of a statute is always favored by the law.⁷ The court reasoned that it was evident from the reading of the whole statute that the legislature did not intend to discriminate between spouses of parties suing an estate of a deceased and other interested persons by removing the incompetency of the former but not that of the latter. It further concluded that it was evident from a reading of the amended statute that the alteration of Section 2 was not even in the mind of the legislature at the time that Section 5 was revised.

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⁶ *People ex rel. Dwight v. Chicago Rys. Co.*, 270 Ill. 140, 110 N. E. 402 (1915); *Yeadon v. Clark*, 276 Ill. 424, 114 N. E. 1023 (1916).

⁷ *Mechanics Sav. Inst. of St. Louis v. Givens*, 82 Ill. 157 (1876); *Hermanek v. Guthmann*, 179 Ill. 563, 53 N. E. 966 (1899).